

From: Dominguez, Alexander
Location: 5530 WJCN
Importance: Normal
Subject: UJEP Staff Meeting (re: CPP/NSR)
Start Date/Time: Mon 10/30/2017 4:00:00 PM
End Date/Time: Mon 10/30/2017 5:00:00 PM
[Final EPA Presidents' Letter 092117 Signed.pdf](#)
[NSR White Paper Draft 101617.pdf](#)
[Integrating NSR Reform and 111d Replacement Rule Draft 101617.pdf](#)

Request:

Staff level meeting with the union groups signed onto the attached letter to discuss CPP replacement rule and NSR reform. All are members of Unions for Jobs & Environmental Progress (UJEP).

Attendees:

Jim Hunter

President - Unions for Jobs & Environmental Progress

Cecile Conroy

Director of Government Relations

Int'l Brotherhood of Boilermakers

Donnie Colston

Director, Utility Department

Int'l Brotherhood of Electrical Workers

Anna Jerry

International Representative, IBEW

Ross Templeton

Director of Government Relations

Int'l Assn of Bridge, Structural, Iron Workers et al.

Mike Mulvaney

Director of Energy & Infrastructure

United Assn of Journeymen & Apprentices of the

Plumbing and Pipefitting Industry of the US and Canada

Stephen Fotis

Partner

Van Ness Feldman (Counsel to IBB)

Eugene M. Trisko

Attorney

Counsel to UMWA, IBB and IBEW (West Virginia v. EPA)

Contact:

Brian Kerkhoven

Energy Policy Advisor

North America's Building Trades Unions

815 16th St. NW, Suite 600

Washington, DC 20006

Direct - 202.756.4654

Cell - 202.494.7241

Email - bkerkhoven@buildingtrades.org

Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

September 21, 2017

Re: Clean Power Replacement Rule and NSR Reform

Dear Administrator Pruitt:

We are writing on behalf of our members representing workers from the electric utility, mining, rail, and construction sectors. We have participated for many years in EPA rulemaking proceedings, including the MATS rule and the Clean Power Plan. Our members have engaged the international climate debate through the UN FCCC process, and through domestic climate legislation and litigation.

We understand that EPA is considering options for replacing the Clean Power Plan (CPP) with an alternative regulatory approach. We wish to take this opportunity to outline elements of a replacement rule based on power plant efficiency improvements.

The proposed framework strictly adheres to the statutory requirements for regulating existing sources under section 111(d) of the Clean Air Act (CAA). These requirements give states the primary role in regulating CO₂ emissions from existing EGUs through the establishment of CO₂ performance standards.

Section 111(d) of the CAA limits EPA's role to establishing a "procedure" for states to submit a plan for the establishment of CO₂ performance standards for existing EGUs. Section 111(d) provides states with primary responsibility for developing performance standards for EGUs in accordance with the "procedure" established by EPA.

Each state should have wide latitude to develop a plan that fits its individual circumstances and priorities. While EPA is responsible for determining the Best System of Emission Reduction (BSER) for source categories, EPA cannot dictate what a state must include or how a state must regulate sources within its jurisdiction. States should have authority to establish source-specific standards based on a variety of factors, including the remaining useful life of the unit, unreasonable cost of control, and physical impossibility of installing emissions control equipment.

EPA should establish a federal-state regulatory process establishing general procedures for states to follow in regulating CO₂ emissions from affected EGUs. These procedures would require each state to set CO₂ performance standards for each affected EGU based on site-specific factors. The form of the performance standards could be set, for example, as a range of CO₂ emissions rate limits for units subcategorized by boiler and coal type, as an “operational standard” that describes the efficiency and maintenance measures (either physical or operational) that should be performed to limit CO₂ emissions from the affected unit, or some combination of these approaches.

To assist states in setting such unit-specific performance standards, EPA should develop guidance on how states should account for variability in plant efficiency reflecting factors such as boiler design, coal type, unit age and size, load level, cooling system, and existing pollution controls. The CO₂ performance standard states establish for each unit would be deemed to meet the requirements of section 111(d).

We also believe that the CPP rulemaking provides EPA with an opportunity to revise current New Source Review (NSR) regulations through a parallel rulemaking. NSR reform would enhance the prospects for investments that would create jobs while modernizing the aging coal fleet. DOE's recent Baseload Power Study¹ highlighted the adverse impacts of current NSR regulations:

The uncertainty stemming from NSR creates an unnecessary burden that discourages rather than encourages installation of CO₂ emission control equipment and investments in efficiency because of the additional expenditures and delays associated with the permitting process. Ironically, the uncertainty surrounding NSR requirements has led to a significant lack of investment in plant and efficiency upgrades, which would otherwise lead to more efficient power generation, benefits to grid management, and reduced environmental impacts. EPA has acknowledged these burdens and has made attempts to reform the rules to improve and streamline NSR.²

The recently announced formation of an NSR Task Force within the agency is a positive step toward constructive NSR reforms.

We hope that these suggestions will be helpful to you and your staff as the agency moves forward in its consideration of a CPP replacement rule.

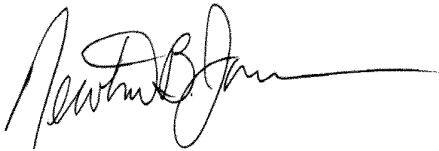
¹ U.S. Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (August 2017).

² Id., at 44 (footnotes omitted.)

Sincerely,



Eric Dean
General President
International Association of Bridge,
Structural, Ornamental, and Reinforcing
Iron Workers



Newton B. Jones
International President
International Brotherhood of
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers



Lonnie R. Stephenson
International President
International Brotherhood of
Electrical Workers



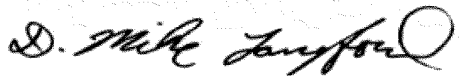
Robert A. Scardelletti
National President
Transportation ● Communications ● Union, IAM



Mark McManus
General President
United Association of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of the United States and Canada



Cecil E. Roberts, Jr.
International President
United Mine Workers of America



D. Michael Langford
International President
Utility Workers Union of America

cc: Members of Congress
Richard L. Trumka
William L. Wehrum, Esq. (EPA Mail Code 6101A)
Mandy Gunasekara, Esq. (EPA Mail Code 1101A)

To: Dominguez, Alexander[dominguez.alexander@epa.gov]
From: Palich, Christian
Sent: Mon 1/8/2018 10:44:56 PM
Subject: RE: NSR Memo

Awesome. Thanks for letting me know Alex.

Have a great evening,

Christian R. Palich

Deputy Associate Administrator

Office of Congressional & Intergovernmental Affairs

U.S Environmental Protection Agency

O: 202.564.4944

C: 202.306.4656

E: Palich.Christian@epa.gov

From: Dominguez, Alexander
Sent: Monday, January 8, 2018 4:55 PM
To: Palich, Christian <palich.christian@epa.gov>
Subject: NSR Memo

No memo today or in the next couple days. In production but not imminent.

Alex Dominguez

Policy Analyst to the Principal Deputy

Office of Air and Radiation

U.S. Environmental Protection Agency

To: Dominguez, Alexander[dominguez.alexander@epa.gov]
Cc: Thundiyil, Karen[Thundiyil.Karen@epa.gov]
From: Ringel, Aaron
Sent: Fri 9/22/2017 2:09:40 PM
Subject: RE: NSR Taskforce

Alex, any info on this? Should I reach out to OP?

-Aaron

From: Ringel, Aaron
Sent: Wednesday, September 20, 2017 11:58 AM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>
Cc: Thundiyil, Karen <Thundiyil.Karen@epa.gov>
Subject: NSR Taskforce

Are you guys running this or is it out of the policy office?

Aaron E. Ringel

Deputy Associate Administrator

Office of Congressional & Intergovernmental Relations

U.S. Environmental Protection Agency

W: 202.564.4373

Ringel.Aaron@epa.gov

To: Ringel, Aaron[ringel.aaron@epa.gov]
From: Dominguez, Alexander
Sent: Fri 9/22/2017 2:36:42 PM
Subject: Re: NSR Taskforce

I would ask OP. I'm not entirely sure and haven't got a chance to sit down with Mandy to discuss.

Sent from my iPhone

On Sep 22, 2017, at 10:09 AM, Ringel, Aaron <ringel.aaron@epa.gov> wrote:

Alex, any info on this? Should I reach out to OP?

-Aaron

From: Ringel, Aaron
Sent: Wednesday, September 20, 2017 11:58 AM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>
Cc: Thundiyil, Karen <Thundiyil.Karen@epa.gov>
Subject: NSR Taskforce

Are you guys running this or is it out of the policy office?

Aaron E. Ringel

Deputy Associate Administrator

Office of Congressional & Intergovernmental Relations

U.S. Environmental Protection Agency

W: 202.564.4373

Ringel.Aaron@epa.gov

To: Christian Palich (palich.christian@epa.gov)[palich.christian@epa.gov]
From: Dominguez, Alexander
Sent: Mon 1/8/2018 9:54:44 PM
Subject: NSR Memo

No memo today or in the next couple days. In production but not imminent.

Alex Dominguez

Policy Analyst to the Principal Deputy

Office of Air and Radiation

U.S. Environmental Protection Agency

To: Cecile Conroy[cconroy@boilermakers.org]
From: Dominguez, Alexander
Sent: Tue 10/10/2017 8:35:59 PM
Subject: RE: CPP NSR Letter to EPA

Thank you very much for this Cecile! Will be in touch in the upcoming days.

Alex

From: Cecile Conroy [mailto:cconroy@boilermakers.org]
Sent: Tuesday, October 10, 2017 3:58 PM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>
Subject: RE: CPP NSR Letter to EPA

Alex,

Per our discussion, for my union colleagues, please contact:

Ironworkers: Ross Templeton, Ex. 6 - Personal Privacy

Boilermakers: Cecile Conroy, Ex. 6 - Personal Privacy

IBEW: Donnie Colston, Ex. 6 - Personal Privacy

TCU/IAM: Ron Kloos, Ex. 6 - Personal Privacy

UA: Mike Mulvaney, Ex. 6 - Personal Privacy

UMWA: Phil Smith, Ex. 6 - Personal Privacy

UWUA: Lee Anderson, Ex. 6 - Personal Privacy

Hope this helps and we all look forward to hearing back from you.

Best,

Cecile

Cecile M. Conroy

Director, IBB DGA

1750 New York Ave NW

Suite 335

Washington, DC 20006

(703) 309-5410 – cell

(202) 756-2868 - office

From: Dominguez, Alexander [<mailto:dominguez.alexander@epa.gov>]

Sent: October 10, 2017 11:21 AM

To: Cecile Conroy <cconroy@boilermakers.org>

Subject: CPP NSR Letter to EPA

Hi Cecile,

Hope you had a good weekend. Would you be able to give me a call today when you have a chance today? This is in regards to the CPP and NSR reform letter sent to the Administrator a few weeks ago.

Best,

Alex Dominguez

*Policy Analyst to the Senior Advisors to
the Administrator for Air and Water*

U.S. Environmental Protection Agency

Direct: 202-564-3164

Cell: 202-578-5989

To: Cecile M. Conroy (cconroy@boilermakers.org)[cconroy@boilermakers.org]
From: Dominguez, Alexander
Sent: Tue 10/10/2017 3:20:56 PM
Subject: CPP NSR Letter to EPA

Hi Cecile,

Hope you had a good weekend. Would you be able to give me a call today when you have a chance today? This is in regards to the CPP and NSR reform letter sent to the Administrator a few weeks ago.

Best,

Alex Dominguez

*Policy Analyst to the Senior Advisors to
the Administrator for Air and Water*

U.S. Environmental Protection Agency

Direct: 202-564-3164

Cell: 202-578-5989

From: Dominguez, Alexander
Location: 5530 WJCN
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Subject: FW: UJEP Staff Meeting (re: CPP/NSR)
Start Date/Time: Mon 10/30/2017 4:00:00 PM
End Date/Time: Mon 10/30/2017 5:00:00 PM
[Final EPA Presidents' Letter 092117 Signed.pdf](#)
[NSR White Paper Draft 101617.pdf](#)
[Integrating NSR Reform and 111d Replacement Rule Draft 101617.pdf](#)

-----Original Appointment-----

From: Dominguez, Alexander
Sent: Wednesday, October 18, 2017 4:40 PM
To: Dominguez, Alexander; Gunasekara, Mandy; Bolen, Brittany; Dravis, Samantha; Schwab, Justin; Baptist, Erik; Harlow, David; Jackson, Ryan; Bennett, Tate
Subject: UJEP Staff Meeting (re: CPP/NSR)
When: Monday, October 30, 2017 12:00 PM-1:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: 5530 WJCN

Request:

Staff level meeting with the unions who signed attached letter to discuss CPP replacement and NSR reform. All are members of Unions for Jobs & Environmental Progress (UJEP).

Attendees:

Jim Hunter

President - Unions for Jobs & Environmental Progress

Cecile Conroy

Director of Government Relations

Int'l Brotherhood of Boilermakers

Donnie Colston

Director, Utility Department

Int'l Brotherhood of Electrical Workers

Anna Jerry

International Representative, IBEW

Ross Templeton

Director of Government Relations

Int'l Assn of Bridge, Structural, Iron Workers et al.

Mike Mulvaney

Director of Energy & Infrastructure

United Assn of Journeymen & Apprentices of the

Plumbing and Pipefitting Industry of the US and Canada

Stephen Fotis

Partner

Van Ness Feldman (Counsel to IBB)

Eugene M. Trisko

Attorney

Counsel to UMW, IBB and IBEW (West Virginia v. EPA)

To: Schwab, Justin[schwab.justin@epa.gov]; Bowman, Liz[Bowman.Liz@epa.gov]
Cc: Abboud, Michael[abboud.michael@epa.gov]
Sent: Thur 12/7/2017 5:01:14 PM
Subject: RE: New Source Review Task Force referenced by Adminsitrator Pruitt at House E&C hearing

There is no "exceptional events guidance." The rule was updated last year and the program has been implementing programmatic changes sense.

From: Schwab, Justin
Sent: Thursday, December 7, 2017 11:50 AM
To: Bowman, Liz <Bowman.Liz@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Abboud, Michael <abboud.michael@epa.gov>
Subject: RE: New Source Review Task Force referenced by Adminsitrator Pruitt at House E&C hearing

I do not.

From: Bowman, Liz
Sent: Thursday, December 7, 2017 11:41 AM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Abboud, Michael <abboud.michael@epa.gov>
Subject: FW: New Source Review Task Force referenced by Adminsitrator Pruitt at House E&C hearing

Do either of you have any thoughts on the exceptional events guidance and/or the task force?

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Begin forwarded message:

Resent-From: <Press@epa.gov>
From: Sean Reilly <sreilly@eenews.net>
Date: December 7, 2017 at 11:29:24 AM EST
To: Press <Press@epa.gov>

Subject: New Source Review Task Force referenced by Adminsitrator Pruitt at House E&C hearing

Hi folks:

Can we get a list of task force members, along with the task force's exact purview, since it appears to be looking at exceptional events guidance as well? Also, on what date was this task force created?

Deadline is 6 p.m. today.

Thanks,
Sean

Sean Reilly
Reporter
E&E News
Ph: 202-316-4596 (Cell)
Ph: 202-446-0433 (Desk)
sreilly@eenews.net
Twitter: @SeanatGreenwire

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Block, Molly
Sent: Tue 12/12/2017 3:50:23 PM
Subject: FW: question regarding "clear error" in NSR emisisions projections

Mandy –

The NSR memo heavily focused on the current ongoing legislation, given the Supreme Court's decision yesterday not to review the case do you have any updated info? I've included the reporters request below. Thanks! Also, let me know if there's anyone else I should contact.

Molly

From: Lu, Jennifer [mailto:jlu1@bloombergenvironment.com]
Sent: Monday, December 11, 2017 5:24 PM
To: Daguillard, Robert <Daguillard.Robert@epa.gov>
Cc: Press <Press@epa.gov>
Subject: Re: question regarding "clear error" in NSR emisisions projections

Thanks for getting back to me. It's up to my editor whether this information is updated to the original story or included in a future story.

A quick follow up question: given the memo signals EPA's approach to new source review going forward, can you comment on how EPA views the Supreme Court's decision not to review the DTE Energy case, but to let the sixth circuit court of appeals decision stand?

Thanks,

Jennifer

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Schwab, Justin
Sent: Tue 12/5/2017 1:23:09 AM
Subject: Re: NSR Memo

Looks like it.

Sent from my iPhone

On Dec 4, 2017, at 8:20 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

Redacted version attached. Can you ensure I took out everything so that it is okay to send to Bill and David H.

Thanks!

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

<NSR Memo_Redacted Version 2017 12 04.pdf>

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Lewis, Josh
Sent: Thur 12/7/2017 6:09:38 PM
Subject: RE: Signed NSR Memo

Got it, and will do

From: Gunasekara, Mandy
Sent: Thursday, December 07, 2017 12:36 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Fwd: Signed NSR Memo

Hold tight until after the energy and comment hearing. Please have this ready for posting online once the hearing wraps up.

Sent from my iPhone

Begin forwarded message:

From: "Hope, Brian" <Hope.Brian@epa.gov>
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "White, Elizabeth" <white.elizabeth@epa.gov>
Subject: Signed NSR Memo

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

Office of the Executive Secretariat

Office of the Administrator

(202) 564-8212

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 1:06:07 PM
Subject: NSR Memo
[NSR Memo Redacted Version 2017 12 04.pdf](#)

Hi Bill and David,

Attached is a memo pertinent to tomorrow's NSR discussion. I have redacted the potentially offending language given your recusal issues and had Justin double check to ensure I got everything out. What you will see is our clarification of the actual-to-projected actual applicability test in determining major modification applicability, which has been a key point of discussion surrounding NSR reform efforts.

Bill – I'll look to call you closer to 9 pm to download on RTBT.

Have a good night!

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Ferguson, Lincoln[ferguson.lincoln@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 12:24:09 AM
Subject: NSR Memo
[NSR policy memo draft 2017 12 2 edits.docx](#)

See attached for SP review.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Thur 12/7/2017 5:43:54 PM
Subject: Fwd: Signed NSR Memo
[NSR Policy Memo.12.7.17.pdf](#)
[ATT00001.htm](#)

This will be ready to be sent out after the hearing concluded. No real press anyway/ just background calls and a desk statement

Sent from my iPhone

Begin forwarded message:

From: "Hope, Brian" <Hope.Brian@epa.gov>
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "White, Elizabeth" <white.elizabeth@epa.gov>
Subject: Signed NSR Memo

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

Office of the Executive Secretariat

Office of the Administrator

(202) 564-8212



E. SCOTT PRUITT
ADMINISTRATOR

December 7, 2017

MEMORANDUM

SUBJECT: New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

FROM: E. Scott Pruitt

TO: Regional Administrators

I. Introduction and Purpose of Memorandum

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions¹ in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

¹ These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules² (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.³

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

II. Background on CAA and Regulatory Provisions and DTE Litigation

A. Relevant CAA and EPA Regulatory Provisions

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

² In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

³ See e.g., Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.⁴

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase⁵ and "net emissions increase"⁶ in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

⁴ The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. § 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

⁵ A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R. § 52.21(b)(52).

⁶ The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. See 40 C.F.R. § 52.21(b)(3).

See 40 C.F.R. § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. See 40 C.F.R. § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R. § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R. § 52.21(b)(41)) and the baseline actual emissions.⁷

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R. § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R. § 52.21(b)(41)(ii)(a). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."⁸ 40 C.F.R. § 52.21(b)(41)(ii)(c). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). See 40 C.F.R. § 52.21(b)(23), (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

⁷ In lieu of using projected actual emissions, owners or operators may use potential to emit. See 40 C.F.R. § 52.21(b)(41)(ii)(d).

⁸ This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under § 52.21(b)(41)(ii)(c).

possibility,” as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.⁹ Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. § 52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. *See* 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would “presume that any increases that occur after 5 years are not associated with the physical or operational changes.”¹⁰

B. DTE Litigation

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA “second guessing” a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA’s projection regulations when there was no post-construction emissions increase. *See id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could “second guess” such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. *Compare id.* at 738-740 *with id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

⁹ These provisions are sometimes referred to as the “reasonable possibility” rule provisions.

¹⁰ 67 FR 80197 (December 31, 2002).

judge who found DTE had not adequately justified its projection (while declining to support the parts of her colleague's opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

III. Discussion

As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,¹¹ if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R. § 52.21(b)(41)(ii)(a). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

¹¹ The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

that it "also believe[d] that it is not necessary to make ... future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if ... physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.¹²

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

¹² With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph ... shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson
Mandy Gunasekara

To: Lewis, Josh[Lewis.Josh@epa.gov]
From: Gunasekara, Mandy
Sent: Thur 12/7/2017 5:36:18 PM
Subject: Fwd: Signed NSR Memo
[NSR Policy Memo.12.7.17.pdf](#)
[ATT00001.htm](#)

Hold tight until after the energy and comment hearing. Please have this ready for posting online once the hearing wraps up.

Sent from my iPhone

Begin forwarded message:

From: "Hope, Brian" <Hope.Brian@epa.gov>
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "White, Elizabeth" <white.elizabeth@epa.gov>
Subject: Signed NSR Memo

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

Office of the Executive Secretariat

Office of the Administrator

(202) 564-8212

To: Justin Schwab (schwab.justin@epa.gov)[schwab.justin@epa.gov]
From: Dominguez, Alexander
Sent: Thur 11/9/2017 3:05:39 AM
Subject: FW: NEDA/CAP NSR Issue Paper: "Begin Actual Construction"
[Begin Actual Construction.pdf](#)

Apologies forgot to forward this to you. If you would like the hardcopy binder they sent over just let me know it's on my desk.

From: Leslie Sue Ritts [mailto:lrtritts@rittslawgroup.com]
Sent: Thursday, November 2, 2017 11:37 AM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: NEDA/CAP NSR Issue Paper: "Begin Actual Construction"

Dear Alex,

Amy Dewey will drop off the notebook with you that has a hard copy of this and all (and there are a lot of them) references for you, Mandy and Justin. Let me know if you have questions and when it is possible to discuss it.

My best,



Leslie Sue Ritts

Ritts Law Group, PLLC

620 Fort Williams Parkway

Alexandria, VA 22304

(703) 823-2292 (office)

(703) 966-3862 (cell)

lratts@rittslawgroup.com

Please note new email address

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"BEGIN ACTUAL CONSTRUCTION"

PROBLEM TO BE ADDRESSED – It is unclear what types of preparatory work may be undertaken at a NSR applicant's own risk before a PSD or Nonattainment NSR (NNSR) permit is issued. NSR regulations use the term "begin actual construction" to denote activities that may be undertaken, but Agency interpretations and EPA Regional enforcement actions have created a confusing and inconsistent web of guidelines that frustrate business efforts to ready a site for installation of an "emitting unit" so that it can begin construction of a "major source" or "major modification" when the permit is issued.

The Clean Air Act prohibits the "construction" of a "major emitting facility"¹ in an attainment area, and the "construction. . . of new or modified stationary sources anywhere in the nonattainment area" unless a permit has been issued for a NSR-affected major source or major modification. CAA §§ 165(a)(1), 172(c)(5); 42 U.S.C. § 7475(a)(1), 42 U.S.C. § 7502(c)(5). The Act, however, did not define "construction."² In 1978, EPA defined "construction" in the context of the statutory prohibition.³ As discussed in the "History," below, EPA defined the term "begin actual construction" in 1980 regulations. Over the past decade, it has been interpreted in such an inconsistent and unnecessary restrictive manner that it poses a burden and legal hurdle for industry to bring new products to market.

PRACTICAL ILLUSTRATION OF THE PROBLEM – A company undergoing NSR review for a proposed new process line in a chemical plant wants to prepare for the new NSR-regulated emission units in order to construct or install those units as soon as the NSR permit is issued. Such preparation is critical for expediting entry of innovative products into the economy once a company receives its NSR permit and may be especially important for facilities in States with harsh winters (necessitating the completion of as much preparatory work as possible during the summer and fall). Before it receives its NSR permit, may the company demolish the process line that is currently at the site, install electric conduits for new lighting, install or extend the concrete slab on which the new emission units will be placed, and pour footings for a building that will house some of the new emission units?

HISTORY – Congress made clear in the 1977 Clean Air Act Amendments that NSR review and issuance of a PSD and/or NNSR permit are required before "construction" of a proposed new major source or major modification of a pre-existing major source. Because the Act did not define the word "construction" and there is no legislative history on Congress's intent regarding that term or the scope of prohibited pre-permit construction, EPA concluded in 1978, that "we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit." E. Reich, Dir., Stationary Source Compliance Division (SSCD), "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of PSD Permit" (Dec. 18, 1978). Thereafter, EPA promulgated a definition of "begin actual construction" to define the line between allowed pre-permit activity, and prohibited construction:

Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and

¹ The Act defines "construction when used in connection any source or facility, to include the modification (as defined in CAA Section 111(a), 42 U.S.C. § 7411(a) [of the New Source Performance Standards]) of any source or facility." CAA § 169(d)(C), 42 U.S.C. § 7479 (2)(C).

² The term "construction" is also used in the Act's definition of the PSD definition of "commenced," which Congress defined "as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary permits or approvals and "either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time." In short, the CAA definition was used to grandfather certain types of sources from the PSD regulations and is repeated verbatim in the NSR regulations. See, e.g., 40 CFR § 52.21(b)(9)(ii).

³ 43 Fed. Reg. 26,380 (June 19, 1978).

construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

See 45 Fed. Reg. 52,676 at 52,731, 52,736, 52,743, 52,745 & 52,748 (Aug. 7, 1980) (*emphasis added*); codified at 40 C.F.R. §§ 40 C.F.R. § 51.166(b)(11)(PSD), 40 CFR 52.21(b)(11) (PSD), 40 C.F.R. 51.165(a)(1)(xv) (NNSR), and at Part 51 Appendix S II.A.17 (NNSR)

Initially, States and EPA officials were directed to undertake a case-by-case approach in applying this definition, but a 1986 EPA Memorandum reflects blowback from the states on the administrative burden of a case-by-case approach, and after consulting with EPA General Counsel, the Director of Stationary Source Enforcement Mr. Reich offered the following “revised policy” regarding the meaning of “begin actual construction:”

All on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances. These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

EPA Memo Re: “Construction Activities Prior to issuance of a PSD permit with Respect to ‘Begin Actual Construction’” (March 28, 1986). The “revised policy” banned all “on-site activities of a permanent nature aimed at completing a PSD source,” and emphasized all other activities are undertaken at the owner’s or operator’s risk. Notably, the revised policy failed to meaningfully discuss the regulatory language limiting the prohibition of pre-permit construction to activities “on an emission unit.” Apparently unsatisfied with even this broad prohibition, additional EPA guidance further expanded the scope of prohibited activities as follows:

Prohibited (permanent and/or preparatory) preconstruction activities ... would include any construction that is costly, significantly alters the site, and/or permanent in nature.

J. Sietz to C. Williams (Dec. 13, 1995). Not only does the 1995 guidance again fail to meaningfully address the focus of the regulatory language on construction activities “on an emission unit,” it allows the magnitude of the cost of the activities, the degree to which the activities alter the site, OR the permanence of the activities to be the sole criterion triggering the pre-permit activity prohibition.

By 1993, the policy had been revisited by EPA and the States a number of times and began to focus on significant economic loss to the owner or a permanent change in the use of the property if a NSR permit eventually was not issued. A 1993 interpretation emphasized. *“Any activities undertaken prior to the issuance of a PSD permit, although solely at the owner's or operator's risk, should minimize or avoid any equity arguments at a later time that the permit should be issued.”* J. Rasnic, “Construction Activities at Georgia Pacific” (May 5, 1993). Another applicability determination dated eight months later allowed “certain limited activities that do not represent *an irrevocable commitment to the project*.” D. Howkamp, “Preconstruction Review and Construction Activities Prior to Permit Issuance” (Nov. 4, 1993). On December 13, 1995, EPA offered “a clarification” on the meaning of “construction-related activities,” that concluded that “preconstruction activities that are permanent in nature and an integral part of the PSD source are prohibited prior to receiving a PSD permit.” J. Seitz, (untitled) (1995); *see also Hempstead Co. Hunting Club v. Southwestern Electric Power Co.*, 2008 WL 2705570, *6 (W.D.AR 2008). Yet again, none of these guidance documents or determinations focused on the regulatory requirement that prohibited pre-permit activities must be “on an emissions unit”; instead, they appear to let an activity’s cost and/or permanence alone drive the prohibition.

While federal EPA interpretations of prohibited pre-permit activity became broader, especially in Notices of Violation, State interpretations in EPA-approved State “Minor NSR programs” are much narrower and focus on prohibiting construction of proposed new and modified emissions units themselves and not on any other preparatory activities. Examples from Michigan and Ohio are attached to this Issue Paper. For instance, in Ohio, OAC rule 3745-31-33(F) allows “minor NSR” sources to undertake any activity at the owner’s own risk so long as the source does not begin to operate. Ohio, OAC rule 3745-31-33(E) lists for “major NSR Sources,” the construction activities, such as site clearing, utility lines, foundation work, etc., can be completed before prohibiting the source from making the utility connection and beginning to operate, until receiving a final air permit-to-install (PTI).

HOW TO FIX IT – EPA should issue an interpretative guidance of “begin actual construction” that allows all pre-permit activities, including construction activities that are not “on an emission unit”⁴ for which an NSR application has been submitted because its construction would result in a net emission increase of one or more pollutants that trigger NSR for the project. Any prior EPA policy or guidance documents inconsistent with this new policy statement should be rescinded or modified.

Such policy would prohibit the “installation of building supports and foundations” only if the building in question is itself an “emission unit,” for example a stand-alone spray coating building (but not an assembly building that would eventually house a paint booth, curing oven or other emission unit). Similarly, the construction of a “permanent storage structure[]” would be prohibited only if the storage structure is itself an “emission unit,” such as a petroleum or volatile organic liquid storage tank or vessel (but not an equipment storage building). Likewise, with regard to laying underground pipework, only the laying of pipework that would carry a liquid or gaseous air pollutant (such as heating oil or natural gas) and that is designed solely to serve one or more new or modified emission units to be included in the new source or modification (such as a new or modified boiler) would be prohibited -- while the digging of trenches for such pipework, the installation of common utilities (e.g. water, sewer, steam, electricity, communication, compressed air) or relocating existing utilities (including those serving existing emission units not included in the new source or modification) in preparation for installing a boiler would be allowed. All demolition, excavation and other site preparation activities (including, but not limited to the construction of retaining walls and roadways would also be allowed.

REFERENCES

- 42 U.S.C. §§ 7470-7479 (CAA Title 1, Part C – Prevention of Significant Deterioration of Air Quality;
- 42 U.S.C. §§ 7501-7506 (CAA Title 1, Part D – Plan Requirements for Nonattainment Areas) of Title 1- Prevention of Significant Deterioration in Attainment Areas);

⁴ Because the definition of “emission unit” in the NSR regulations is very general -- “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant” -- permit applicants and permitting authorities need more specific guidance on what constitutes an emission unit for the purpose of applying the “begin actual construction” test. For the limited purpose of determining whether a construction activity is “on an emissions unit,” EPA should adopt the approach developed by the Michigan DEQ, that distinguishes among “devices” (i.e., process devices, control devices, and stacks), “emission units” (i.e., one or more process devices, zero or more control devices, and all related stacks), and a “stationary source” (i.e., the buildings and structures that house the emission units). See, e.g., Michigan Guide to Environmental, Health, and Safety Regulations – 9th Edition (June 2016), <http://www.michigan.gov/deq/0,4561,7-135-3308-15820--,00.html>, at pages 1-3 through 1-4. Applying this approach to the “begin actual construction” question, only physical on-site construction activities of a permanent nature on a “device” that is a component of an “emissions unit” would be prohibited, while construction on a “building or structure that will house the emission units” would not be prohibited. Permit applicants and permitting authorities should also be encouraged to refer to Michigan DEQ AQD Operational Memorandum #6 (January 2014) (Procedure for Determining Emission Units), http://www.michigan.gov/documents/deq/DEQ-AQD-PP-006_447000_7.pdf, for additional guidance on determining what constitutes an emission unit for this purpose.

“Begin Actual Construction”

- 40 C.F.R. §§ 40 C.F.R. 51.166(b)(11) (*PSD*), and 40 C.F.R. 51.165(a)(1)(xv); Part 51 Appendix S:II.A.17; 45 Fed. Reg. 52,676 at 52,731, 52,736, 52,743, 52,745 & 52,748 (Aug. 7, 1980)
- 43 Fed. Reg. 26,380 (June 19, 1978).
- *Hempstead County Hunting Club v. Southwestern Electric Power Co.*, 2008 WL 2705570, 68 ERC 1027 (W.D. AR 2008)
- J. Seitz, (untitled) (Dec. 13, 1995)
- D. Howekamp, "Preconstruction Review and Construction Activities Prior to Permit Issuance" (Nov. 4, 1993)
- J. Rasnic, "Construction Activities at Georgia Pacific" (May 13, 1993)
- E. Reich, "Construction Activities Prior to Issuance of a PSD Permit with Respect to 'Begin Actual Construction'" (Mar. 28, 1986)
- E. Reich, "Interpretation of "Constructed" as it Applies to Activities Undertaken Prior to Issuance of PSD Permit (Dec. 18, 1978).
- Michigan Guide to Environmental, Health, and Safety Regulations – 9th Edition (June 2016), <http://www.michigan.gov/deq/0,4561,7-135-3308-15820--,00.html>, at pages 1-3 through 1-4; Michigan DEQ AQD Operational Memorandum #6 (January 2014) (Procedure for Determining Emission Units), http://www.michigan.gov/documents/deq/DEQ-AQD-PP-006_447000_7.pdf.
- OHIO - OAC Rule 3745-31-33
- EPA Reg. 5, Notice of Violation to Conoco Phillips (Sept. 4, 2008)
- EPA Reg. 5, Notice of Violation to Steel Dynamics East, IN (Feb. 16, 2001)

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Schwab, Justin
Sent: Tue 5/30/2017 12:43:22 PM
Subject: FW: Heads Up - Expect Call from Region 3 Administrator on NSR Issue

FYI

From: Doster, Brian
Sent: Tuesday, May 30, 2017 8:42 AM
To: Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: Heads Up - Expect Call from Region 3 Administrator on NSR Issue

Kevin and Justin,

I am writing to give you a heads up that you Kevin may be getting a call this week from the Regional Administrator for Region 3 (Cecil Rodrigues) about a Clean Air Act New Source Review issue in Pennsylvania.

Ex. 5 - Attorney Client/Attorney Work Product

Ex. 5 - Attorney Client/Attorney Work Product

We will follow up on this at ARLO Reg Review today and schedule more time with you after that if needed.

Brian L. Doster

Assistant General Counsel for NSR, Radiation, and Emergency Response

Air and Radiation Law Office

Office of General Counsel

(202) 564-1932

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Schwab, Justin[Schwab.Justin@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]
From: Traylor, Patrick
Sent: Thur 11/2/2017 7:11:30 PM
Subject: RE: NSR Reform

That'll work.

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

From: Gunasekara, Mandy
Sent: Thursday, November 2, 2017 2:59 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>
Subject: RE: NSR Reform

Yes – that process worked well. Timing wise, somewhat soon. Let's plan for an initial meeting in the next few weeks. Does that work?

From: Schwab, Justin
Sent: Thursday, November 2, 2017 2:10 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Subject: Re: NSR Reform

For my two cents, I agree and OGC is happy to facilitate any such process.

Sent from my iPhone

On Nov 2, 2017, at 2:08 PM, Traylor, Patrick <traylor.patrick@epa.gov> wrote:

Thanks, Mandy. We're developing our thoughts, which we'll be happy to share. What's your timing on this? I imagine we'll need the same kind of process that we used successfully in the Hunter Title V petition matter.

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

On Oct 25, 2017, at 2:03 PM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

Yes – see attached. The team sent this to me a couple weeks ago. I have not yet spent significant time on it. Please take a look and let me know your thoughts. Once we get a further down the process, let's plan to meet and discuss.

Best,

Mandy

From: Traylor, Patrick

Sent: Wednesday, October 25, 2017 10:24 AM

To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>

Cc: Bodine, Susan <bodine.susan@epa.gov>

Subject: NSR Reform

Mandy:

Would you please include Susan and me at the very earliest opportunity in the

distribution for whatever draft memoranda or guidance documents that may be relevant to the Section 52.21(r) issue? We have your one-page outline.

Thanks,

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

<NSR policy memo_draft_10-4-17PSLrev.docx>

To: Lewis, Josh[Lewis.Josh@epa.gov]
From: Gunasekara, Mandy
Sent: Mon 12/4/2017 3:19:06 PM
Subject: Fwd: NSR Memo
[NSR policy memo draft 2017 12 2 edits.docx](#)
[ATT00001.htm](#)

FYI

Sent from my iPhone

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: December 4, 2017 at 9:02:53 AM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Patrick Traylor" (traylor.patrick@epa.gov) <traylor.patrick@epa.gov>
Cc: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>
Subject: NSR Memo

Good Morning –

Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Thanks,

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

To: Schwab, Justin[schwab.justin@epa.gov]; Traylor, Patrick**Cc:** Bodine, Susan[bodine.susan@epa.gov]
From: Gunasekara, Mandy
Sent: Thur 11/2/2017 6:59:20 PM
Subject: RE: NSR Reform

Yes – that process worked well. Timing wise, somewhat soon. Let's plan for an initial meeting in the next few weeks. Does that work?

From: Schwab, Justin
Sent: Thursday, November 2, 2017 2:10 PM
To: Traylor, Patrick <traylor.patrick@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>
Subject: Re: NSR Reform

For my two cents, I agree and OGC is happy to facilitate any such process.

Sent from my iPhone

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Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

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Yes – see attached. The team sent this to me a couple weeks ago. I have not yet spent significant time on it. Please take a look and let me know your thoughts. Once we get a

further down the process, let's plan to meet and discuss.

Best,

Mandy

From: Traylor, Patrick
Sent: Wednesday, October 25, 2017 10:24 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Reform

Mandy:

Would you please include Susan and me at the very earliest opportunity in the distribution for whatever draft memoranda or guidance documents that may be relevant to the Section 52.21(r) issue? We have your one-page outline.

Thanks,

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

(202) 564-5238 (office)

(202) 809-8796 (cell)

<NSR policy memo_draft_10-4-17PSLrev.docx>

Agenda for Monthly Air Permitting Staff Call
February 1, 2017
2:00 – 4:00 pm Eastern Time
Call-in Number: 866-299-3188 || Code: Ex. 6 - Personal Privacy

Today's agenda:

- 2:00 pm Roll call and New Staff Introductions – Stephanie Kordzi (R6)
- 2:05 pm Regional Issues || Lori Shepherd (R4) (see attachment)
- Roxul USA Air Permit – Modeling Issues
 - Upcoming Air Permitting Workshop for state, local, and tribal agencies
- 2:20 pm Rulemaking Updates – Charles Buckler (OAQPS) (see attachment)
- 2:30 pm Update || Recent Petitions – Janet McDonald (OAQPS)
- Alon Bakersfield Crude Oil Flexibility Project - Laura Yannayon (R9) and Matt Spangler (OAQPS)
 - Piedmont Green Power, LLC - Terry Johnson (R4) and Janet McDonald (OAQPS)
 - See: <https://www.epa.gov/title-v-operating-permits/title-v-petition-database>
- 2:45 pm Overview of Identified Issues (20 minutes per issue)
- Ameren US District Court Decision – Jon Knodel (R7)
 - DTE II on Appeal Sixth Circuit Court Decision – Ethan Chatfield & Sabrina Argentieri (R5)
 - Keystone PAL Issue – Gerallyn Duke (R3)
- 3:45 pm Around the Regions || Regional report out/policy decisions
- 3:55 pm Call wrap-up and action items – Stephanie Kordzi (R6)

Heads Up...

Region 5 will take the lead for Regional Issues on our March 1st call

Reminder || Please review your recent correspondence and e-mail for any significant or other precedent-setting documents to Jon Knodel or Ward Burns in Region 7 for inclusion in the NSR Policy and Guidance Database. **To join the Permit List Serve** || Send a blank email, from the email address you want added to the list serve, to subscribe-permit@lists.epa.gov

To: Doster, Brian[Doster.Brian@epa.gov]
Cc: Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Mon 10/30/2017 10:53:26 PM
Subject: RE: DTE opp. redline - footnote 1

Brian,

Thank you very much. **Ex. 5 - Deliberative Process; Attorney-Client Communications**

Ex. 5 - Deliberative Process; Attorney-Client Communications

Best,

Justin

From: Doster, Brian
Sent: Monday, October 30, 2017 4:02 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>
Cc: Williams, Melina <Williams.Melina@epa.gov>
Subject: DTE opp. redline - footnote 1

Justin,

Following up on Reg. Review today, **Ex. 5 - Deliberative Process; Attorney-Client Communications**

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

Brian

From: Schwab, Justin

Sent: Friday, October 27, 2017 4:13 PM

To: Feigin, Eric (OSG) <Eric.Feigin@usdoj.gov>; Wood, Jeffrey (ENRD)

<Jeffrey.Wood@usdoj.gov>; Robert.Lundman@usdoj.gov; Tom Benson

<thomas.benson@usdoj.gov>

Cc: Minoli, Kevin <Minoli.Kevin@epa.gov>; Traylor, Patrick <traylor.patrick@epa.gov>;

Doster, Brian <Doster.Brian@epa.gov>; Chapman, Apple <Chapman.Apple@epa.gov>;

Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>

Subject: DTE opp. redline

Dear All,

Please find attached.

Please let us know if you have any questions.

In particular, please let us know if you would like further discussion

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

Best,

Justin

To: Doster, Brian[Doster.Brian@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Schwab, Justin
Sent: Tue 12/5/2017 1:56:00 PM
Subject: RE: Meeting today with Wehrum on NSR - May address [Ex. 5 - Deliberative Process]

Thank you, Brian. Please forward me the invitation.

From: Doster, Brian
Sent: Tuesday, December 5, 2017 8:48 AM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Burke, Marcella <burke.marcella@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Meeting today with Wehrum on NSR - May address [Ex. 5 - Deliberative Process]

I am writing to let you know about a late-breaking meeting today with Bill Wehrum at 1 p.m. on New Source Review. I understand that the purpose of the meeting is to begin talking about the NSR reform initiatives OAR wants to pursue, and one of those includes [Ex. 5 - Deliberative Process] Another is [Ex. 5 - Deliberative Process] I have heard about 3 other NSR topics that are on OAR's list and we may hear more about Bill's goals for those areas today.

Ex. 5 - Deliberative Process; Attorney-Client Communications

The meeting information is below. If you'd like to put this on your calendar, let me know and I'll forward the meeting invite so you can accept it.

-----Original Appointment-----

From: Wehrum, Bill
Sent: Monday, December 04, 2017 4:32 PM
To: Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Bodine, Susan; Traylor, Patrick; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago,

Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Srinivasan, Gautam; Schmidt, Lorie; Doster, Brian

Cc: Brooks, Phillip; Chapman, Apple; Kelley, Rosemarie; Schwab, Justin

Subject: NSR Discussion

When: Tuesday, December 05, 2017 1:00 PM-1:45 PM (UTC-05:00) Eastern Time (US & Canada).

Where: WJC-N 5400 + 1-866-299-3188; Participant Code: 202-256-4000

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Doster, Brian; Schmidt, Lorie; Srinivasan, Gautam

To: Doster, Brian[Doster.Brian@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
Cc: Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Mon 10/9/2017 10:51:45 PM
Subject: RE: For review: Memos related to DTE NSR case
EDIT NSR policy memo draft 10-4-17PSL.docx

Please find redline/bubbles attached on the “NSR Policy memo_draft” document.

From: Doster, Brian
Sent: Wednesday, October 4, 2017 3:31 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Cc: Williams, Melina <Williams.Melina@epa.gov>
Subject: For review: Memos related to DTE NSR case

Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation, plus a piece of background information. ARLO would like to discuss this topic at our Hot Issues meeting on Thursday.

The first attachment is the current draft of the memo

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

The draft OGC companion memo also identifies some points to consider in evaluating these options. Per the recommendation of Melina and I,

Ex. 5 - Deliberative Process; Attorney-Client Communications

The third attachment is a one-page outline that was provided to OAR as a guide to develop the primary draft memo (first attachment). I have added highlights to the third attachment to show the 4 key points that OAR tried to address in the primary memo.

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

Brian

Brian L. Doster

Assistant General Counsel for NSR, Radiation, and Emergency Response

Air and Radiation Law Office

Office of General Counsel

(202) 564-1932

To: Williams, Melina[Williams.Melina@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Mills, Derek[Mills.Derek@epa.gov]
From: Schwab, Justin
Sent: Wed 11/15/2017 8:44:23 PM
Subject: RE: DTE Cert Reply

Thank you for the update. Will review.

From: Williams, Melina
Sent: Wednesday, November 15, 2017 2:37 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Doster, Brian <Doster.Brian@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Mills, Derek <Mills.Derek@epa.gov>
Subject: DTE Cert Reply

Hi Justin,

I'm passing on DTE's reply brief, which was filed today. I haven't had the chance to read it carefully yet, but on a quick look

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Please let us know if you have any questions or would like to discuss further. I'm checking with DOJ on the next steps in the process, but my working assumption is that there's nothing further for us to do until the Court has made a decision one way or the other on the cert petition.

Thanks,

Melina

Melina Williams | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3406 | fax: (202) 564-5603

The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client, attorney work product, or otherwise privileged material. Do not distribute outside of EPA or DOJ.

From: Customer Service [<mailto:briefs@wilsonpepes.com>]

Sent: Wednesday, November 15, 2017 10:51 AM

To: SupremeCtBriefs@usdoj.gov; robert.lundman@usdoj.gov; Tom Benson <thomas.benson@usdoj.gov>; kristin.furrie@usdoj.gov; elias.quinn@usdoj.gov; Williams, Melina <Williams.Melina@epa.gov>; Argentieri, Sabrina <argentieri.sabrina@epa.gov>; Chatfield, Ethan <chatfield.ethan@epa.gov>; sfisk@earthjustice.org; msoules@earthjustice.org; solom@dteenergy.com; andrea.hayden@dteenergy.com; lundm@pepperlaw.com; bbrownell@hunton.com; mbierbower@hunton.com; pjohnson@hunton.com;

mjaber@hunton.com; gsibley@hunton.com; brosser@hunton.com

Cc: Customer Service <briefs@wilsonpe.com>; Chris Dorsey
<chrisdorsey@wilsonpe.com>

Subject: No. 17-170 Reply Brief

The attached Reply Brief No. 17-170 has been HAND FILED today at the Supreme Court on November 15, 2017. Service parties will receive hard copy service per rule 29.5.

No. 17-170

IN THE
Supreme Court of the United States

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on November 15, 2017, three (3) copies of the REPLY BY PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

NOEL J. FRANCISCO
Solicitor General of the United States

JEFFREY H. WOOD
Acting Assistant Attorney General

ROBERT J. LUNDMAN

THOMAS A. BENSON

KRISTIN M. FURRIE

ELIAS L. QUINN

Attorneys

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
(202) 514-2203

Of Counsel:

MELINA WILLIAMS

SABRINA ARGENTIERI

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
(202) 564-8040

ETHAN CHATFIELD

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION V
77 West Jackson Boulevard
Chicago, IL 60604

MICHAEL SOULES

EARTHJUSTICE

1625 Massachusetts Avenue, N.W.
Suite 702

Washington, D.C. 20036
(202) 797-5237

SHANNON W. FISK

EARTHJUSTICE

1617 John F. Kennedy Boulevard
Suite 1130
Philadelphia, PA 19103
(215) 717-4522

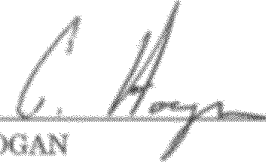
Counsel for Sierra Club

The following email addresses have also been served electronically:

SupremeCtBriefs@usdoj.gov
robert.lundman@usdoj.gov
thomas.benson@usdoj.gov
kristin.furrie@usdoj.gov
elias.quinn@usdoj.gov
williams.melina@epa.gov
argentieri.sabrina@epa.gov
chatfield.ethan@epa.gov
sfisk@earthjustice.org
msoules@earthjustice.org

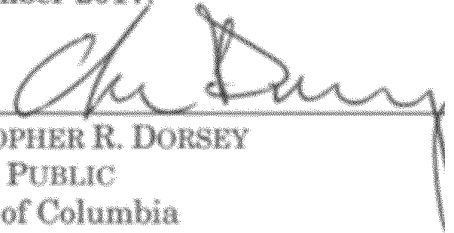
solom@dteenergy.com
andrea.hayden@dteenergy.com
lundm@pepperlaw.com
bbrownell@hunton.com
mbierbower@hunton.com
pjohnson@hunton.com
mjaber@hunton.com
gsibley@hunton.com
brosser@hunton.com

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to have been served.



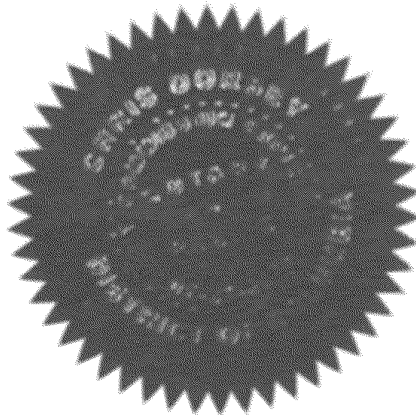
CASEY HOGAN
WILSON-EPES PRINTING COMPANY, INC
775 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 15th day of November 2017.



CHRISTOPHER R. DORSEY
NOTARY PUBLIC
District of Columbia

My commission expires July 31, 2018.



ExchangeDefender Message Security: [Check Authenticity](#)

Cc: Minoli, Kevin[Minoli.Kevin@epa.gov]; OGC ARLO MGMT[OGC_ARLO_MGMT@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]; Williams, Melina[Williams.Melina@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Schwab, Justin
Sent: Tue 5/2/2017 11:56:38 PM
Subject: Re: Sixth Circuit denial of rehearing in the DTE enforcement case

I remember. Thanks.

Sent from my iPhone

> On May 2, 2017, at 7:46 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

>

> Please see Melina's note below.

>

> Justin – this is one of the cases on which we met with DOJ earlier this year.

>

> Lorie Schmidt

> Associate General Counsel, Air and Radiation

> Office of General Counsel

> US Environmental Protection Agency

> (202)564-1681

>

> From: Williams, Melina

> Sent: Tuesday, May 02, 2017 7:44 PM

> To: Rao, Raj <Rao.Raj@epa.gov>; Keller, Peter <keller.peter@epa.gov>; Deroeck, Dan

<Deroeck.Dan@epa.gov>; Wood, Anna <Wood.Anna@epa.gov>; Santiago, Juan

<Santiago.Juan@epa.gov>

> Cc: Doster, Brian <Doster.Brian@epa.gov>; Argentieri, Sabrina <argentieri.sabrina@epa.gov>;

Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>

> Subject: Sixth Circuit denial of rehearing in the DTE enforcement case

>

> All,

>

> We wanted to pass on the good news that the Sixth Circuit denied the company's petition for rehearing and rehearing en banc in the Detroit Edison (DTE) New Source Review (NSR) enforcement case. The order (first attachment) is quite short. It notes that the original panel reviewed the petition for rehearing and concludes that the issues raised "were fully considered upon the original submission and decision of the cases." It further explains that no judge from the full court requested a vote on the suggested rehearing en banc. For these reasons, the petition was denied.

>

Ex. 5 - Attorney Client

This order leaves in place a decision by the divided panel from January 2017 (second attachment) to reverse and remand, for a second time, the district court's dismissal of the government's claims that DTE violated NSR requirements when it performed a \$65 million renovation project at the Monroe Power Plant in Detroit, Michigan without first obtaining the necessary permit and installing best available control technology for SO₂ and NO_x. The January 2017 plurality decision makes clear that under the law of the Sixth Circuit, 1) EPA may bring an enforcement action based on a challenge to a company's pre-construction emissions projections, including their technical and scientific basis; and 2) that actual post-project emissions are legally irrelevant to that challenge and cannot be used to preclude enforcement based on emissions projections.

>

> DOJ expects t

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Our DOJ attorney also noted t

Ex. 5 - Attorney Client

c

Ex. 5 - Attorney Client

>
> Let us know if you have any questions,
>
> Melina
>
> Melina Williams | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code
2344A | phone: (202) 564-3406 | fax: (202) 564-5603
>
> The contents of this e-mail and any attachments to it may contain deliberative-process, attorney-client,
attorney work product, or otherwise privileged material. Do not distribute outside of EPA or DOJ.
>
> <ENV_ENFORCEMENT-#2658517-v1-dte_app2_ORDER_denying_rehearing(s).pdf>
> <ENV_ENFORCEMENT-#2635551-v1-DTE_-_Sixth_Circuit_Opinion.pdf>

To: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Sat 12/9/2017 6:48:59 PM
Subject: Fwd: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo
[LetterWithNSRguidance-c.pdf](#)
[ATT00001.htm](#)

ICYMI

Sent from my iPhone

Begin forwarded message:

From: "Doster, Brian" <Doster.Brian@epa.gov>
To: "Schwab, Justin" <Schwab.Justin@epa.gov>, "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>
Cc: "Williams, Melina" <Williams.Melina@epa.gov>
Subject: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo

FYI, DTE's counsel sent the attached to the Supreme Court enclosing EPA's NSR memo.



HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

F. WILLIAM BROWNELL
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FILE NO: 55788.000042

December 8, 2017

By Hand

The Honorable Scott S. Harris
Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0002

Re: Case No. 17-170, *DTE Energy Company, et al. v. United States*

Dear Mr. Harris:

In its brief in opposition in the above-captioned case, the United States states that “the EPA is currently reviewing its New Source Review policies and regulations” and that “[t]hat review may result in changes.” Br. for the United States in Opp’n at 17 (Nov. 1, 2017). A memorandum released by EPA late yesterday addressing the initial results of that review is enclosed.

Sincerely,

F. William Brownell
Counsel of Record for Petitioners
DTE Energy Company and Detroit Edison Company

Enclosure

cc: Noel J. Francisco
Michael Soules
Cynthia Rapp, Deputy Clerk

ENCLOSURE



E. SCOTT PRUITT
ADMINISTRATOR

December 7, 2017

MEMORANDUM

SUBJECT: New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

FROM: E. Scott Pruitt

TO: Regional Administrators

I. Introduction and Purpose of Memorandum

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions¹ in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

¹ These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).



NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules² (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.³

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

II. Background on CAA and Regulatory Provisions and DTE Litigation

A. Relevant CAA and EPA Regulatory Provisions

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

² In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program, 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

³ See e.g., Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.⁴

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase⁵ and "net emissions increase"⁶ in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(a).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

⁴ The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. §§ 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

⁵ A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R. § 52.21(b)(52).

⁶ The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. See 40 C.F.R. § 52.21(b)(3).

See 40 C.F.R. § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. See 40 C.F.R. § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R. § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R. § 52.21(b)(41)) and the baseline actual emissions.⁷

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R. § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R. § 52.21(b)(41)(ii)(a). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from a particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."⁸ 40 C.F.R. § 52.21(b)(41)(ii)(c). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on a consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). See 40 C.F.R. § 52.21(b)(23), (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

⁷ In lieu of using projected actual emissions, owners or operators may use potential to emit. See 40 C.F.R. § 52.21(b)(41)(ii)(d).

⁸ This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under § 52.21(b)(41)(ii)(c).

possibility," as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.⁹ Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. § 52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. See 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would "presume that any increases that occur after 5 years are not associated with the physical or operational changes."¹⁰

B. DTE Litigation

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. See *U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA "second guessing" a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA's projection regulations when there was no post-construction emissions increase. See *id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could "second guess" such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. Compare *id.* at 738-740 with *id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

⁹ These provisions are sometimes referred to as the "reasonable possibility" rule provisions.

¹⁰ 67 FR 80197 (December 31, 2002).

judge who found DTE had not adequately justified its projection (while declining to support the *partnership* opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

III. Discussion

* As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,¹¹ if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R. § 52.21(b)(41)(ii)(a). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

¹¹ The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

that it "also believe[d] that it is not necessary to make ... future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if ... physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.¹²

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emissions projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(b). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

¹² With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph ... shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson
Mandy Gunasekara

No. 17-170

IN THE SUPREME COURT OF THE UNITED STATES

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, one copy of the foregoing letter was served, as required by U.S. Supreme Court Rule 29.5(b), on the following:

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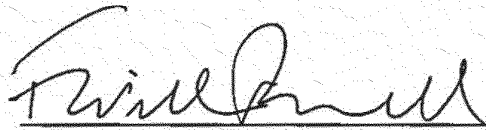
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Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties
required to be served have been served.



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Sent: Fri 12/8/2017 6:48:49 PM
Subject: Re: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo

Thank you.

Sent from my iPhone

On Dec 8, 2017, at 1:36 PM, Doster, Brian <Doster.Brian@epa.gov> wrote:

FYI, DTE's counsel sent the attached to the Supreme Court enclosing EPA's NSR memo.

<LetterWithNSRguidance-c.pdf>